No. 15A-724, No. 14-1504

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Applicants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Respondents.

Application From The United States District Court For The Eastern District of Virginia

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REPLY IN SUPPORT OF APPLICATION FOR STAY OF REMEDIAL PLAN PENDING RESOLUTION OF DIRECT APPEAL OF LIABILITY JUDGMENT

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Plaintiffs' and Defendants' Oppositions dramatically confirm that the Court should stay the majority below's unprecedented remedial plan pending the Court's plenary review of liability and allow the 2016 election to proceed under the Legislature's Enacted Plan. Plaintiffs and Defendants do not dispute *any* of the facts demonstrating that any reversal of liability here will create extraordinary confusion and burdens on voters, candidates, and election officials. Specifically, Plaintiffs and Defendants do not dispute that Virginia must begin preparing ballots for the June 14 primary elections on April 1 and mail those ballots no later than April 30 in order to comply with the federal Military and Overseas Voter Empowerment ("MOVE") Act. Plaintiffs and Defendants also do not dispute that this Court will not hold oral argument in the liability appeal until March 21 *at the earliest*. *See* App'n 16-23.

Consequently, it cannot be seriously disputed that:

- Any reversal of the liability judgment will occur *after* Virginia has incurred the substantial and irretrievable expense of printing and sending out ballots for the vacated remedial districts, and will require Virginia to *duplicate* those costs for the restored Enacted Districts.
- Under the MOVE Act, any reversal by this Court *at any time* will require postponing the June 14 primary.
- Any reversal after June 9 will almost certainly require postponing the general elections in the five affected districts *past the nationwide November 8 Election Day* in this presidential election year.

- Any post-June 14 reversal will also require *redoing* the entire primary cycle and the primary elections.
- Any reversal will thwart any effort to elect Virginia's second black congressional representative in remedial District 4, in the middle of the election cycle or even after a June 14 primary victory.

See id.

Unable to deny the calamitous consequences of a liability reversal, Plaintiffs and Defendants nonetheless maintain that a stay is unwarranted because they contend such consequences are unlikely to eventuate because the Court is likely to affirm liability. *See* Pl. Opp. 14-23; Def. Opp. 13-27. There are four fatal flaws in this argument.

First, the fact that the Court has granted plenary review means that there is at least *some* prospect of reversal—and any such prospect is simply too high given the extraordinary injury that the Commonwealth, its voters, and its candidates undisputedly will suffer if that risk eventuates. *Second*, the mere *prospect* of reversal imposes *current* injury even if liability is ultimately affirmed. Such uncertainty forces candidates to conduct a two-front campaign in *both* the Enacted and remedial districts—which necessarily severely burdens candidates' campaigns and will inevitably create mass confusion among the *more than one million Virginians* who currently reside in different remedial districts than their districts under the Enacted Plan. *Third*, this Court's precedent has "repeatedly emphasized" that the "balance of equities," standing alone, weighs heavily in favor of conducting

elections under "plans created by the legislature" rather than "judicially constructed plans" where liability has not been finally resolved by this Court, even where, as in *Karcher*, an affirmance is likely (and ultimately entered). *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J); *see also Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (Mem.); *White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.).

Fourth, Plaintiffs and Defendants badly miscalculate the likelihood of a reversal. Plaintiffs and Defendants claim that the majority's finding of racial "predominance" can be reversed only for clear factual error. *See* Pl. Opp. 14-23; Def. Opp. 13-27. They therefore overlook—and *repeat*—the majority's fundamental and reversible *legal* errors. *See* Pl. Opp. 14-23; Def. Opp. 13-27. Simply put, like the majority, Plaintiffs and Defendants cannot identify *any* conflict between race (or the alleged 55% BVAP "floor") and either Republican political goals or the neutral principles the Legislature applied to all eleven districts—protecting incumbents by largely preserving the cores of existing districts. *See* Pl. Opp. 14-23; Def. Opp. 13-27; App'n 32-33; Br. For Appellants 25-53. Consequently, the straightforward legal issue on appeal is whether a *Shaw* violation occurs where "race" is fully consistent with politics and the generally applied neutral principles, thus precluding race from "subordinating" those neutral policies or "significantly affect[ing]" the challenged district's shape or demographics. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270-71 (2015); App'n 32-33; Br. For Appellants 25-53. The majority's notion that such subordination can occur absent such an inconsistency is plain legal error. And

Plaintiffs' and Defendants' sole argument for inconsistency between race and politics is that the Legislature did not *want* to retain Republican incumbents. *See* Pl. Opp. 14-23; Def. Opp. 13-27. This assertion not only is facially absurd, but also is at war with the majority's factual finding that "partisan politics" and "protecting incumbents" "inarguably" "motivated" the Legislature in drawing District 3. J.S. App. 31a. Plaintiffs' and Defendants' selective repudiation of the majority's factual findings cannot mask the majority's legal errors or the fair prospect of reversal here. The Court should follow its established practice, stay the remedial plan, and allow the 2016 elections to proceed under the Enacted Plan.

I. PLAINTIFFS' AND DEFENDANTS' OPPOSITIONS CONFIRM THAT THE MAJORITY'S UNPRECEDENTED, PREMATURE, AND OVERBROAD REMEDY WARRANTS A STAY.

Plaintiffs' and Defendants' Oppositions do not even respond to—let alone rebut—Applicants' showing of "a likelihood that irreparable harm will result from the denial of a stay"; that the "equities" and "weigh[ing] [of] relative harms" favor a stay; and of "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); App'n 16-37.

1. As to precedent, Plaintiffs and Defendants cannot cite a single case where a remedy has been entered during this Court's liability review or distinguish the Court's "repeated[]" holdings emphasizing that the "the balance of equities" strongly favors conducting elections under "plans created by the legislature" rather than "judicially constructed plans" while liability remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J.); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412

U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.); *see* Pl. Opp. 14-23; Def. Opp. 13-27. Plaintiffs and Defendants cite inapposite cases where federal courts "order[ed] implementation of a remedial redistricting plan while an appeal was pending before this Court." Pl. Opp. 12; Def. Opp. 32-36. But *none* of these decisions involved a three-judge court *entering* any remedy when, as now, this Court was actively considering liability on plenary review.

In fact, in all but two of those decisions, liability either already had been finally established by a *prior* appeal to this Court or was not contested. Thus, these cases support only the entirely different proposition that a court may stay a remedy for a proven violation pending a successive appeal of the *remedy*. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 77 (1997) (liability established in *Miller v. Johnson*, 515 U.S. 900 (1995)) (cited at Def. Opp. 35); *Travia v. Lomenzo*, 381 U.S. 431, 432 (1965) (liability established in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)) (cited at Pl. Opp. 12); *Branch v. Smith*, 538 U.S. 254, 258 (2003) (impasse case where equal-population violation not contested) (referred to in *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (cited at Pl. Opp. 13 n.4)); *Karcher v Daggett*, 466 U.S. 910 (1984) (liability established in *Karcher v. Daggett*, 462 U.S. 725 (1983)) (cited at Def. Opp. 35 n.161). In such cases, there is no possibility of using a plan "created by the legislature," since the only issue is what judicial remedy should be used.[1] In the

[1] Moreover, the Court never found "substantial questions" but instead summarily affirmed the judicial remedies in two of these appeals, *see, e.g.*, *Travia*, 381 U.S. 431, *summ. aff'd*, *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965); *Karcher*, 466

two cases where liability had not previously been established, there was no opportunity for a reversal on liability because there was no appeal of liability, *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (cited at Pl. Opp. 13 n.4 and Def. Opp. 32, 35), or this Court had denied the appeal and summarily affirmed. *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004), *summ. aff'd*, 542 U.S. 947 (2004) (cited at Pl. Opp. 12-13 and Def. Opp. 34).

Plaintiffs and Defendants also cite the Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), *see* Pl. Opp. 1; Def. Opp. 32, 36, 39, but that also was not a case in which the Court's plenary review of liability would be completed in the middle of an ongoing election cycle, *see* 377 U.S. at 585. Moreover, the Court recognized in *Reynolds* that "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* Those considerations include "the proximity of a forthcoming election and the mechanics and complexities of . . . election laws" and the need to "avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State." *Id.* Thus, *Reynolds* is entirely consistent with this Court's "repeated[]" "balanc[ing] of the equities" in

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U.S. 910, *summ. aff'd*, 467 U.S. 1222 (1984), and did not complete its review of the two other remedial appeals until *after* the election, *see Abrams*, 521 U.S. at 74; *Branch*, 538 U.S. at 258. Thus, these cases have no application here, where the Court has found substantial questions on liability and its review will be completed mid-cycle.

cases where its plenary review of liability remains pending, *Karcher*, 455 U.S. at 1306-07 (Brennan, J.), particularly when its liability decision will issue in the middle of the election cycle and any reversal of a judicial remedy would unleash "unreasonable [and] embarrassing" electoral chaos on the Commonwealth, *Reynolds*, 377 U.S. at 585; App'n 16-23.

2. Plaintiffs and Defendants do not dispute that any liability reversal will require moving 1,111,088 people back to the Enacted Districts in the middle of an election cycle and will unleash electoral chaos on the Commonwealth's voters, candidates, and election officials. *See* Pl. Opp. 23-30; Def. Opp. 32-37. Thus, all parties *agree* that, absent a stay, the majority's remedial plan subjects Virginia to an extraordinary—and unprecedented—risk of mass voter confusion, an immense waste of taxpayer and private resources, postponement of the primary elections, and, depending on the timing of the reversal, even *postponement of congressional general elections* until *after* the nationwide November 8 Election Day in this presidential election year. App'n 16-23. And all parties agree that these consequences would be especially significant for candidates whose campaigns for the new electoral opportunities afforded by the remedial plan would be rendered nugatory by a mid-cycle reversion to the Enacted Plan, including a black candidate of choice mounting a historic campaign in remedial District 4 to become Virginia's second black congressional representative. *See id.*

Plaintiffs and Defendants do not even attempt to offer any reason why the Court should countenance these harms on the Commonwealth and its voters.

Instead, they attempt to change the subject and argue that the Court may not even *consider* these harms, but instead must myopically focus only on the irreparable harms to Applicants. *See* Pl. Opp. 23-30; Def. Opp. 27-32. This is flatly incorrect: any consideration of the "balance of equities" necessarily requires consideration of the public interest. *Karcher*, 455 U.S. at 1306-07 (Brennan, J.); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.). Plaintiffs and Defendants recognize as much because they argue that "the public interest" weighs in favor of their position. *See* Pl. Opp. 30-32; Def. Opp. 32-37. Thus, as Applicants have explained, the public interest in avoiding electoral chaos, widespread voter confusion, and irretrievable waste of taxpayer resources weighs heavily in favor of a stay. *See* App'n 16-23.

In all events, even the specific harms to Applicants constitute "irreparable injury" warranting a stay. App'n App. B at 34-36 (Payne, J., dissenting). In fact, Plaintiffs do not even try to dispute that the remedial plan irreparably harms Republican Applicant Randy Forbes's re-election prospects. *See* App'n 25-26; Pl. Opp. 23-30. Nor could they: the remedial plan transforms District 4 from a 48% Democratic district into a 60.1% overwhelmingly majority-Democratic district by moving nearly 47.9% of Enacted District 4's current population into other districts and replacing it with new voters. *See* App'n 25-26. Thus, Defendants' half-hearted attempt to suggest that Applicant Forbes might be able to win re-election in remedial District 4 because he won re-election in Enacted District 4, *see* Def. Opp. 30-31, ignores the remedial plan's substantial overhaul of District 4 and destruction

of Applicant Forbes's incumbency advantage. *See* App'n 25-26.

3. Plaintiffs and Defendants also do not dispute that the majority's unprecedented and premature remedy already has imposed a "two-front" campaign on Virginia, its voters, and its candidates. *See* Pl. Opp. 27-30; Def. Opp. 27-32; App'n 23-27; App. B at 34-36 (Payne, J., dissenting). This two-front campaign alone warrants entry of a stay because—as the majority never disputed—it "presents a realistic, serious, and immediate threat of confusion for candidates and constituents alike." App. B at 35 (Payne, J., dissenting); App'n 23-27. Indeed, the more than one million Virginians the majority has placed in limbo will inevitably become confused by being the targets of two campaigns featuring two sets of candidates, particularly when one campaign and slate of candidates is automatically removed mid-cycle by any liability decision from this Court. *See* App'n 23-27. Moreover, the parallel campaigns "make[] considerable added expense to all candidates, both incumbents and challengers, a certainty." App. B at 35 (Payne, J., dissenting). Funding and running two different campaigns in two different districts with different opponents and potentially different issues is a "heavy" burden that "*could affect the results of an election* by diverting scarce resources to a district that ultimately was not called for by the Supreme Court's decision." *Id.* at 36 (emphasis added); *see* App'n 23-27.

Plaintiffs and Defendants cannot deny any of this, but simply blithely note that Applicants can avoid the duplicative costs of conducting parallel campaigns if they choose to campaign *only* in either the Enacted District or the remedial district. *See* Pl. Opp. 27-30; Def. Opp. 27-32. But any such cost savings will necessarily

jeopardize their re-election prospects by limiting their campaigning to an electorate that may not be the one ultimately casting the votes. Thus, the remedial plan necessarily injures Applicants by forcing on them the Hobson's Choice of incurring the additional cost of campaigning in both the Enacted and remedial districts or running the risk of losing the election by limiting their campaigning to only the Enacted (or remedial) district. *See* Pl. Opp. 27-30; Def. Opp. 27-32.

4. In addition to citing the inapposite case law discussed above, *see supra* pp. 4-7, Plaintiffs and Defendants repeat the majority's contentions that a remedial plan is immediately required because Plaintiffs' "right to vote" is at stake, Plaintiffs already have gone through two elections in Enacted District 3, the public has "an interest" in holding elections under a constitutional plan, and, for some undisclosed reason, it would be "easier" for Virginia to change from the remedial plan to the Enacted Plan mid-cycle than from the Enacted Plan to the remedial plan. *See* Pl. Opp. 30-32; Def. Opp. 32-36. But, as explained, the right to vote, the public interest in constitutional elections, and the (alleged) relative ease of switching plans have been present in *all* prior cases in which the Court has granted stays pending its plenary review—and the Court has "repeatedly emphasized" that these factors do not change the "balance of equities" that requires a stay in these circumstances. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.).

Plaintiffs and Defendants fall back on arguing that "switch[ing] from the enacted plan to the remedial plan" mid-cycle upon any affirmance of liability by this

Court would also cause "electoral 'chaos.'" Pl. Opp. 31-32; Def. Opp. 36. Applicants wholeheartedly agree: for that very reason, the Court has "repeatedly emphasized" that "judicially constructed plans" should be stayed in favor of "plans created by the legislature" so that *no* change in plan occurs in the middle of an election calendar. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064 (Mem.); *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.). Indeed, as Applicants have explained, *any* mid-cycle change in plan would be disastrous for the Commonwealth's voters, candidates, and election officials. *See* App'n 16-27. And the *only* way to ensure that there will be no mid-cycle change in redistricting plan is to follow the Court's established practice and allow the 2016 elections to proceed under the Legislature's Enacted Plan because the federal courts cannot impose the remedial plan on the Commonwealth if the Court reverses the liability judgment.

Moreover, as explained, Plaintiffs have no one but themselves to blame for the timing of this lawsuit and the remedy. *See* Pl. Opp. 1-2; App'n 27-31. Plaintiffs did not file suit until 21 months after the Legislature adopted the Enacted Plan and 11 months after it was used in the 2012 elections—and Plaintiffs are "largely responsible" for the fact that the three-judge court could not enter a remedy in time for the 2014 elections. App. B at 13 n.7; *see also id.* at 37 (Payne. J., dissenting). Thus, the *only* question is whether the Court should grant a stay of the remedial plan for the first election in which Plaintiffs' suit was even arguably timely, where its plenary review of liability is ongoing. Particularly in the circumstances presented here—where suit was instigated not by concerned citizens but by the

"National Democratic Redistricting Trust," *id.* at 40-41 (Payne, J., dissenting)—the Court should follow its established practice and grant the stay, *see* App'n 27-31.

5. Finally, there is "a fair prospect that a majority of the Court will vote to reverse" the majority's flawed liability judgment and, thus, vacate the remedial plan. *Hollingsworth*, 558 U.S. at 190. The Court's grant of plenary review of the liability decision signals at least a prospect of reversal. *See* App'n 31-37; Br. For Appellants 14-63. And the majority committed a host of glaring legal errors in transforming a *Shaw remedy* into a *Shaw violation*, each of which independently warrants reversal. *See* App'n 31-37; Br. For Appellants 14-63.

First—despite Applicants' repeated invitations to do so—neither the majority, Plaintiffs, nor Defendants have identified *any* conflict between race and the neutral incumbency-protection, core-preservation, and political principles that "inarguably" "motivated" the Legislature in drawing District 3. J.S. App. 31a; App'n 31-37; Br. For Appellants 25-53; Pl. Opp. 10-23; Def. Opp. 13-27. For this reason alone, Plaintiffs failed to carry their "demanding" burden to show that race *subordinated* neutral principles and "significant[ly] affected" or "change[d]" District 3's boundaries. *Ala.*, 135 S. Ct. at 1270-71; App'n 31-37; Br. For Appellants 25-53. The majority's insistence on finding a *Shaw* violation in the absence of that required showing alone is reversible legal error. *See* App'n 31-37; Br. For Appellants 25-53.

Plaintiffs' and Defendants' invocation of the entirely fictitious "55% BVAP floor," *see* Pl. Opp. 10-23; Def. Opp. 13-27, confirms, rather than refutes, this error. In the first place, as Applicants have explained, the alleged BVAP floor is entirely a

figment of the majority's imagination. *See* Br. For Appellants 43-46. But in all events, even if the Legislature had announced that it would not allow District 3's BVAP to go below 55%, this would not suggest—much less satisfy Plaintiffs' "demanding" burden to show—that race *predominated* over traditional principles. *Easley v. Cromartie*, 532 U.S. 234, 241, 253 (2001) (*Cromartie II*); Br. For Appellants 29-30. Rather, Plaintiffs still would be required to show that this purported racial floor *conflicted* with the Legislature's traditional districting priorities—a showing that neither Plaintiffs nor Defendants so much as *attempt* to make. *See* Br. For Appellants 29-30, 43-46; *Ala.*, 135 S. Ct. at 1270-71; *see also* Pl. Opp. 10-23; Def. Opp. 13-27.

Second, Plaintiffs and Defendants do not dispute that the majority failed to enforce the Court's directive as to *how Shaw* plaintiffs must show racial predominance. Plaintiffs and Defendants do not dispute that the majority never required Plaintiffs to offer an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Cromartie II*, 532 U.S. at 258; Pl. Opp. 10-23; Def. Opp. 13-27. And Plaintiffs and Defendants do not dispute that Plaintiffs' Alternative Plan fails that requirement because, as Plaintiffs' expert Dr. McDonald testified, the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" black "quota" and performs "significant[ly] worse" than the Enacted Plan on the Legislature's race-neutral priorities. JA 686-87, 889-90; *see* App'n 31-37; Br.

For Appellants 39-43; Pl. Opp. 10-23; Def. Opp. 13-27.

Third, Plaintiffs and Defendants fail to rehabilitate the majority's finding of a *Shaw* violation where the Legislature *minimized* the conflict between race and its neutral political goals by adopting the *only* plan presented at the time or in litigation that both complies with Section 5 and preserves the 8-3 partisan split in favor of Republicans. *See* App'n 34-35; Br. For Appellants 53-57; Pl. Opp. 10-23; Def. Opp. 13-27.

Rather than meeting the majority's legal errors head-on, Plaintiffs and Defendants principally argue that the majority's "finding" of racial predominance is reviewable only for clear factual error. Pl. Opp. 10-23; Def. Opp. 13-27. But the majority's findings of "predominance" rested on its legally erroneous notion that predominance is *ipso facto* established because the "non-negotiable" federal Voting Rights Act "predominates" over discretionary state law neutral principles. *See* J.S. App. 2a, 21a-23a; Br. For Appellants 28-32. It does not rest on the legally required basis; *i.e.*, that there is some *conflict* between race and politics or traditional districting principles where race "predominates" over these neutral interests. And Plaintiffs' and Defendants' post-hoc effort to *create* a conflict by arguing that preserving District 3's BVAP was *contrary* to the Legislature's masochistic desire to have *fewer* Republican incumbents flies in the face of the majority's factual finding that "protecting incumbents" and "partisan politics" "inarguably" "motivated" the Legislature in drawing Enacted District 3 (as well as common sense). J.S. App. 31a; *see* App'n 31-37; Br. For Appellants 25-53. Plaintiffs' and Defendants' position thus

requires the Court to overlook not only the majority's legal errors, but also its factual findings that Plaintiffs and Defendants disfavor.[2]

Finally, in all events, even if Plaintiffs and Defendants had properly framed the issue presented, their conclusion that the Court should deny a stay is fundamentally wrong. That the Court granted plenary review means that there is *some* prospect of reversal—and any such prospect warrants a stay due to the extraordinary injury that the Commonwealth, its voters, and its candidates undisputedly will suffer if that risk eventuates. The Court should grant a stay.

II. THE MAJORITY LACKED JURISDICTION TO ENTER THE REMEDIAL PLAN

Even if the Court does not believe that the requirements for a stay are satisfied by the undisputed risk of electoral chaos shown above, it still should grant a stay because the majority lacked jurisdiction to enter the remedial plan. *See* App'n 37-39; *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982); *United States v. Locke*, 471 U.S. 84, 92 (1985); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *East Carroll Parrish School Bd. v. Marshall*, 424 U.S. 636, 638 n.4 (1976). Plaintiffs and Defendants repeat the majority's unpersuasive reasoning that the notice of appeal divested the lower court of jurisdiction only over liability, but not over the remedy. Pl. Opp. 32-36; Def. Opp. 37-39. Thus, like the

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[2] Plaintiffs' challenge to Applicants' standing is so unmeritorious that even Defendants do not join it. *See* Pl. Opp. 25; Def. Opp. 27-32. Applicant Forbes has standing because the remedial plan directly injures his re-election prospects, and all Applicants in districts adjacent to District 3 have standing because the liability judgment necessarily requires altering their districts. *See* Br. For Appellants 57-63.

majority, Plaintiffs and Defendants ignore that Applicants' notice of appeal pertained to *both* the majority's liability decision *and* its remedy enjoining use of the Enacted Plan. *See* App'n 37-39. Therefore, even under Plaintiffs' and Defendants' theory, the notice of appeal divested the majority of jurisdiction over the entire case, including the remedy. *See id.*

Indeed, Plaintiffs' and Defendants' cases involving appeals to federal courts of appeals vividly illustrate that the majority lacked jurisdiction to enter the remedial plan. Plaintiffs' and Defendants' cases hold that while a district court may "enforce" an injunction on appeal such as through contempt or ongoing supervision, it may not "enlarge the scope" of the injunction or grant additional remedies, even if the additional remedies were contemplated by, or relate to, the original injunction. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (collecting cases) (cited at Pl. Opp. 33 and Def. Opp. 37); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 827 (10th Cir. 1993) (cited at Pl. Opp. 34). Thus, while the three-judge court could *enforce* its original injunction prohibiting Virginia from using the Enacted Plan, it lacked jurisdiction to *enlarge* that injunction to require use of a specific judicial remedial plan while the direct appeal of the injunction remained pending. *See, e.g., Cincinnati Bronze, Inc.*, 829 F.2d at 588; *Roberts*, 998 F.2d at 827.

Moreover, Plaintiffs and Defendants suggest that Rule 62(c) confers jurisdiction to enter a remedial plan, Pl. Opp. 34; Def. Opp. 37, but precisely the *opposite* is true. Rule 62(c) authorizes district courts to enter an "injunction pending appeal" only "on terms for bond or other terms that secure the opposing

party's rights" pending the appeal. Fed. R. Civ. P. 62(c). It therefore did not give the majority carte blanche to enter a remedial plan while "the entire case" is pending before this Court. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

Finally, any doubt on jurisdiction must be resolved in favor of Applicants and against Plaintiffs who sought entry of a remedial plan while the Court's plenary review of liability remained pending. *See* App'n 37-39; *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).[3]

CONCLUSION

The Court should stay the lower court's remedial plan and allow the 2016 elections to proceed under the Legislature's Enacted Plan.

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[3] Plaintiffs and Defendants repeat their reliance on *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (Pl. Opp. 35 & Def. Opp. 34), even though that case has no bearing here because no party challenged the three-judge court's jurisdiction to enter a remedial plan, the three-judge court did not consider that question, and this Court *summarily affirmed* the liability judgment without conducting plenary review, *see, e.g.*, 542 U.S. 947; App'n 39 n.4.

Respectfully submitted,

January 22, 2016

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29, I, John M. Gore, a member of the Supreme Court Bar, hereby certify that one copy of the attached Reply was served via electronic mail and UPS on January 22, 2016 on:

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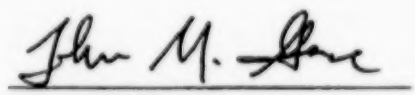

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